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No. 94-1719

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1994

MOUNTAINWEST FINANCIAL CORPORATION,
Petitioner,

v.

VISA USA INC.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Respondent VISA USA Inc. is a joint venture membership corporation. The petitioner is properly identified in the Petition for Writ of Certiorari.

RULE 29.1 LISTING

Pursuant to Rule 29.1, respondent VISA USA Inc. discloses that it does not have subsidiaries or affiliates that have issued shares to the public.

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent VISA USA Inc. ("VISA") opposes MountainWest Financial Corporation's ("Dean Witter's") Petition for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit.

OPINIONS BELOW, JURISDICTION AND STATUTORY PROVISION INVOLVED

The petition properly identifies the opinions below, the basis for the district court's and the court of appeals' jurisdiction, as well as Dean Witter's basis for invoking this Court's jurisdiction. The petition also sets forth the text of the relevant statute.

INTRODUCTION

Dean Witter asserts that this is a "landmark" case. Its own petition demonstrates otherwise. To be sure, the payment card industry is important and large damages are claimed. But those are not grounds for review and there is nothing exceptional about the court of appeals' decision in this case. It applied familiar legal principles and simply held that, on the record presented, petitioner failed to prove any cognizable harm to competition.

Faced with that unexceptional holding, petitioner labors to construct supposed "conflicts" among the circuits (three-way no less) on the issues of (a) ancillarity and (b) market power. But to do so it must materially contort the decision below, including the legal principles and factual record on which it was based. Moreover, it elevates differences of judicial expression into fundamental jurisprudential disputes that none of the supposedly "conflicting" cases even recognize, let alone deem of great moment. It is surely telling that the "conflicts" claimed by petitioner not only were unnoticed by the Tenth Circuit, but were not even called to its attention by Dean Witter.

This is an easy case, both factually and legally. The issuance of general purpose charge cards is one of the most remarkably diffuse and competitive lines of business in American commerce. That fact was demonstrated, without dispute, at trial by evidence of the market's virtually "atomistic" character, the near total absence of barriers to entry, and consistent growth in both output and new card programs. App. 16a. Given that market structure, it was scarcely surprising that petitioner offered no evidence of supracompetitive profits or other competitive failure.

Instead, Dean Witter demanded access to VISA's trademarks and goodwill so that it could follow a preferred "branding strategy" (its term) and avoid "cannibalizing" (ditto) its own Discover card by offering both a proprietary card (Discover) and a further brand of VISA. In short, it demanded judicially compelled access to VISA's property (to wit, a compulsory trademark license) without any proof of monopolization, "essentiality," market failure, or even its inability to be an effective competitor in the market.

Such a claim utterly confounds the most fundamental notions of protecting private property and encouraging investment in innovation and entrepreneurial risk-taking upon which that precept rests. It is small wonder, therefore, that the Tenth Circuit had no difficulty rejecting Dean Witter's claims as a matter of law, that not a single judge of that court voted to grant rehearing, and that even the district judge (although feeling constrained to honor the jury's decision) observed that "I would have hung the jury before I would have come back with that verdict." R. at 1592.[1]

COUNTER-STATEMENT OF THE CASE

VISA and Issuer Competition

VISA is a joint venture membership corporation. Its basic structure and operation remain largely unchanged from its early days when it pioneered development of the general purpose charge card.[2] It operates pursuant to a system of rules that govern its interdependent financial exchange network. It is responsible for providing the systems and processes through which millions of VISA transactions are approved, cleared and settled between members every day. R. at 423-34, 1408.

VISA, itself, does not issue cards or contract with merchants. Nor does it limit the finance rates, annual fees or other terms on

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[1] Or, as he put it in denying plaintiff's post-trial request for an injunction:

> To this moment I don't see how a company the size of Sears Roebuck [Dean Witter's parent at the time of trial] has to resort to our antitrust laws to obtain the property of a joint venture, or a single company or anyone else, when they have shown their ability, impressively so, to be successful and viable and very profitable in this very arena. (R. at 1592).

[2] For a description of the growth of general purpose charge cards, see D. Baker & R. Brandel, *The Law of Electronic Fund Transfer Systems* ¶¶ 1.02[3], 23.02[1] (2d ed. 1988) (*"EFT"*); *National Bancard Corp. (NaBanco) v. VISA U.S.A., Inc.*, 596 F. Supp. 1231, 1236-37 (S.D. Fla. 1984), *aff'd*, 779 F.2d 59 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

which cards are offered. It also does not restrict output or the geographic areas in which members compete to issue cards or sign merchants. R. at 433-35; App. 4a, 15a. As a result, in literally every area of the country numerous banks compete to solicit new cardholders and merchants on a wide variety of terms. Overall, VISA today has approximately 6,000 issuer-members with the top 10 issuers accounting for approximately 50% of its total volume. App. 16a. However, even the smallest bank can offer its customers the full range of VISA services. R. at 877-83, 915-29.

Banks compete for cardholders in numerous ways: some advertise heavily; others solicit only their regular banking customers. Some charge relatively higher prices in return for greater service or add-ons, such as extended product warranties, or credit towards free airline tickets or other products, ranging from small household appliances to a new car. Some offer very low interest rates by strictly controlling credit standards; others are more generous in their credit evaluation and must charge higher rates as a consequence; still others offer programs that support charitable, cultural or educational institutions. R. at 859-60, 864-79, 1458-59, 1461-64.

VISA membership originally was open only to traditional commercial banks. However, over the years, membership eligibility has been expanded to include savings and loans, thrifts, credit unions and, most recently, even the banking affiliates of industrial corporations such as Ford Motor Company, General Electric, and ITT. R. at 1503. In fact, with the exception of its two major intersystem competitors (Discover and American Express), VISA membership is open to any financial institution that is eligible for federal deposit insurance. R. at 1400-03. In addition, numerous non-member industrial companies participate in the business through so-called "affinity" partnerships with member banks. Many of the largest new VISA and MasterCard programs, such as the AT&T Universal Card and the Shell/Chemical Bank Card, are examples of such programs.

Intersystem (or Interbrand) Competition

While card issuance is the focus of Dean Witter's claims, it does not reflect the full nature of competition in the general

purpose charge card market. VISA also competes at the brand level against its system rivals (principally American Express and Discover), and *vice versa*. This competition between different card brands or systems — *intersystem* competition — is equally important. Certain important functions are (and must be) carried out at the system level. Thus, as noted, VISA has established a number of sophisticated computer and communication mechanisms that are responsible for controlling the approval, clearing and settlement of transactions. Each of the other interbrand competitors operates similar systems and there has been substantial technological competition over the years to create greater efficiency at the intersystem level by such things as improving the approval and settlement process in order to limit fraud and bad debt losses and to increase customer convenience.

Intersystem competition also takes the obvious form of direct brand-level promotion, such as VISA's well-known sponsorship of the Olympics and its ubiquitous "and they don't take American Express" advertising campaign. R. at 432-33. Equally important, vast amounts of money are invested by members, both at the systems and bank institution level, to promote the VISA brand and enhance the efficient operation of the service for consumers.

Unlike the thousands of competing issuers, there has never been more than a handful of systems competitors. Moreover, there is a nearly complete overlap in ownership between VISA and its early intersystem rival, MasterCharge (now MasterCard).[3] While new system-level entry is possible, as Discover itself attests, there is considerable doubt that others will consider it prudent, given the costs involved and the emerging potential of home computers to effect consumer financial transactions.

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[3]That overlap has been broadly criticized. *See, e.g., EFT* ¶ 23.02[3]; Constantine, Presentation (Dec. 6, 1990), in *Economists' Perspectives on Antitrust Today: Antitrust Issues in Regulated Industries* (C. River Assocs. eds., 1991) (R. at 1613); Balto, *Access Demands to Payment Systems Joint Ventures*, 18 Harv. J.L. & Pub. Pol'y 636, 638-40 (forthcoming June 1995). For a history of the subject, see *EFT* ¶¶ 23.02[2]-[3].

Discover

In 1986, Sears, Roebuck & Company and its Dean Witter subsidiary entered the market with Discover. Before doing so, Dean Witter conducted an elaborate analysis of the economics of the general purpose charge card industry. R. at 313-14. A high-level task force was appointed to consider two alternatives: become a major issuer of VISA or MasterCard or, alternatively, enter the business with a new, wholly-owned proprietary card. R. at 366-74. The study showed that membership in VISA or MasterCard offered certain advantages and was less economically risky. R. at 536-50, 1325-26. Those advantages, however, were perceived to be outweighed by the significant disadvantages of being just one more VISA (or MasterCard) member, with no ultimate control over product configuration and identity or over business and marketing strategies. R. at 536-50, 1327-28. Thus, the task force recommended that Dean Witter follow what it termed the "high reward/high risk" strategy of going into active competition with the two bankcard joint ventures through a new wholly-owned product. R. at 542-50, 1327.

Discover was launched in early 1986 with a massive promotional campaign, offering a no-fee card and a rebate of up to 1%. R. at 322-24.[4] The new brand came complete with its own authorization, clearing and other systems that were comparable to those of VISA, MasterCard and American Express.[5]

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[4]Whatever the appeal of these features as a consumer "come on," they scarcely qualified the product as "low price" when its high interest rate and deceptively expensive method of computing finance charges were taken into account — a fact the district court was at pains to note. *See* App. 70a & n.30.

[5]Dean Witter's decision to go "head to head" in competition with VISA understandably was not welcome. VISA urged its members to avoid helping Discover and (for a short time) denied Discover access to VISA-owned terminals in some merchant locations, thereby requiring Discover to compete by creating its own terminals, which it did. *See* App. 31a. Both at trial and, again, here (Petition ("Pet.") 5-6) Dean Witter has portrayed this "anti-Discover" campaign as purported evidence of anticompetitive conduct by VISA. But absent any claim that

After substantial early losses, Discover became very successful.[6] R. at 325-26, 379-80, 386-87, 1586. Within five years of its introduction, it had become the second largest issuer of general purpose charge cards in the United States, with over 20 million card accounts. R. at 533-35, 885-86, 888-90. By the time of trial it had signed over 1.5 million merchants to accept its card, including virtually every major merchant in the country. R. at 379-82, 533-35, 791. With system volume of over $14 billion and net profits of $170 million, Discover was a major contributor to Sears' overall profitability. R. at 311, 325-28, 1585-86. In fact, according to documents produced on the eve of trial, the value of Discover as a stand-alone business was assessed at approximately two billion dollars by Sears' investment bankers. R. at 403-04.

Dean Witter's Efforts to Become a VISA Member

In 1989, Greenwood Trust Co., the issuer of the Discover card and a Sears, Roebuck & Company subsidiary,[7] applied to become a VISA member. VISA rejected the application because it believed that it was inconsistent with the interests of the joint venture to admit a direct intersystem competitor. At the same time, the Board adopted By-Law 2.06 which, by its terms, prohibits membership in VISA by existing system competitors,

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VISA's activities were deceptive or otherwise unfair, they reflect nothing more than "vigorous competition," which the antitrust laws encourage. *Cf. Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) ("Competition is a ruthless process. . . . The deeper the injury to rivals, the greater the potential benefit. These injuries to rivals are byproducts of vigorous competition, and the antitrust laws are not balm for rivals' wounds.").

[6] Its success was not always certain. In fact, based on some early press reports, VISA's management believed that Discover's start-up costs were so great that it might seek to convert its program into VISA. VISA's willingness to explore that possibility is documented in the testimony of VISA's former CEO, Charles Russell. R. at M745-46.

[7] Sears recently spun off its Dean Witter subsidiary which has since been renamed Dean Witter, Discover & Co.

specifically Discover and American Express.[8] The by-law provides:

> [I]f permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors . . . .

At the time Greenwood Trust applied for membership, Dean Witter had no plans to initiate a VISA card program. Rather, as discovery in the subsequent litigation showed, its purposes were to blunt intersystem competition by VISA against Discover and to obtain information about VISA's operations and plans. R. at 387-89, 1346.

In 1990, Dean Witter decided that it did want to issue a VISA (or MasterCard). Rather than approach the matter directly, Dean Witter purchased the assets (including a VISA membership) of a failed Utah thrift from the Resolution Trust Corporation and, without notice to VISA, set about to use that membership to launch its proposed new VISA card program. VISA fortuitously discovered those plans and thwarted them. Dean Witter promptly filed the present lawsuit and obtained a preliminary injunction to allow it to proceed with its planned new program. The Tenth Circuit equally promptly stayed and subsequently vacated that injunction. *See* 936 F.2d 1096 (10th Cir. 1991).

The Trial

Dean Witter asserted at trial that VISA's refusal to permit it to become a member precluded it from pursuing a preferred "brand-

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[8]Dean Witter argues that a recital about preserving intersystem competition in the resolution that accompanied adoption of the new by-law is disingenuous, since the VISA Board surely did not act out of any such selfless motive. But the concern expressed was not for preserving Dean Witter's competition; it was about the unfairness to intersystem competition *against* VISA's members if Dean Witter was allowed to have the benefits of a proprietary card as well as a VISA membership. R. at 475-78.

ing" strategy of offering both a Discover card and a VISA card to consumers. R. at 306-07, 309. It further asserted that its new Prime Option card would be attractive to consumers because of its supposedly low interest rate and other features. *Id.* Dean Witter did not claim, however, that it possessed any unique abilities as a card issuer. Nor did it claim that it was unable to compete successfully without access to the VISA name and systems or that it was prevented from offering Prime Option on its own with all of the same features (except, of course, the VISA name), either as a new proprietary card or as an additional brand of Discover. Rather, it claimed that, as a proprietary card, it could not "reach" those potential customers who preferred a bank card. Hence, it asserted that it could be a more "effective" competitor if it could *also* issue its competitor's brand. According to its expert economist, James Kearl of Brigham Young University, VISA's refusal to let it become a member unreasonably restrained trade, given the aggregate market share of VISA's members.

VISA's defense rested in part on the undisputed evidence concerning market structure, which negated any claim that competition was harmed by its membership rules. VISA's By-Law 2.06 excluded only two firms (Dean Witter and American Express) from access to the VISA *brand*, not from the general purpose charge card market, which has consistently grown both in output and new issuers. By contrast to the competition among issuers, undisputed evidence showed that competition at the systems level was significantly limited. Allowing Dean Witter to issue a VISA card would compromise that intersystem competition by increasing the opportunities for collusion and strategic coordination, notwithstanding Dean Witter's claim that it still intended to compete vigorously with Discover.

VISA's expert, Richard Schmalensee, a professor at MIT and a member of President Bush's Council of Economic Advisors, testified about the importance of preserving incentives for both joint ventures and single firms to innovate — testimony which was not substantially contested. R. at 947-50; *compare* R. at 829-33. Dr. Schmalensee testified that, for the same reasons courts do not oblige single firms to share the fruits of their investment in

entrepreneurial innovation short of monopolization or control of an "essential facility," it is inappropriate to require such sharing by efficiency-creating joint ventures. To do otherwise would make joint ventures less competitively attractive than single firms or complete integration through merger, even though partial integration is often the most efficient means of achieving economies of scale and scope. R. at 948-49.

Dean Witter also advanced two other themes at trial. The first — repeated no fewer than six times in its present petition[9] — is that VISA discriminated against it by allowing Citicorp's Diners Club to remain a member while it (and American Express) were excluded. But aside from the fact that the Sherman Act is not a civil rights statute,[10] the evidence showed that VISA's members viewed Diners as a mere corporate niche product with nearly 20% of its business attributable to a single account (since lost) with the United States government.[11] Moreover, VISA viewed it as a stagnant, if not failing, product. R. at 634-35. Thus, other than as a "fairness" theme (which, of course, was how Dean Witter played the issue to the jury), VISA's failure to deem Diners a competitive card proved nothing.[12]

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[9] Its technique in this regard is not new. The fact that the meeting at which VISA adopted By-Law 2.06 took place in *Cannes, France* was mentioned to the jury 61 times during the trial.

[10] *See Sanjuan v. American Bd. of Psychiatry & Neurology, Inc.*, 40 F.3d 247, 252 (7th Cir. 1994) ("the Sherman Act is not a precursor to the Civil Rights Act of 1964").

[11] Diners Club is solely a non-credit card targeted at business travelers. The fact that there is some overlap with VISA's cardmember base does not distinguish Diners from numerous other proprietary and local card programs (ATM and point-of-sale principally) that overlap in a similar fashion but are scarcely considered "competitive" with VISA.

[12] The implicit assertion of the argument is that Dean Witter was singled out for exclusion because it allegedly would have offered a "low-priced" VISA card. But that argument fails to take account of the fact that the prices of VISA's 6,000 other issuers were not controlled in any way, and that numerous large and equally low-cost new VISA programs have come into the system in recent years.

Second, Dean Witter asserted that VISA's by-laws were anticompetitive for the independent reason that they created a "disincentive" for other firms, including existing VISA members, to develop new charge card systems in competition with VISA. The claim was presented as pure theory by Dean Witter's expert without evidence that any VISA member actually considered going into systems competition with VISA, let alone desisted from doing so because of its by-laws. Not only was the claim hopelessly speculative, as the Tenth Circuit concluded (*see* App. 19a n.14), but Dean Witter lacked standing to raise it since it would have been helped — not harmed — by any such "disincentive" effect. Nonetheless, the district court allowed the claim to go to the jury which rendered a general verdict in Dean Witter's favor. The general verdict format makes it impossible to determine what factual determinations the jury made, and on which theory.

Post-Trial Proceedings

Following the jury's verdict, VISA moved for judgment as a matter of law under Rule 50 or, in the alternative, for a new trial under Rule 59. Contemporaneously, the parties briefed VISA's Section 7 counterclaim that had been tried to the court. On April 1, 1993, the court denied VISA's motions and entered judgment against VISA on its counterclaim.

The court stated that, in its view, VISA's arguments were sound, both as a matter of antitrust policy and on the evidence presented. App. 69a-71a. The court noted that VISA's concern with the need to protect incentives for innovation by joint ventures not only raised "legitimate policy considerations" but was "logical and well reasoned." App. 60a; *see also id.* at 66a-67a. Specifically,

> [t]he court found Visa's policy and economic arguments to be the more compelling .... [T]he court found persuasive Visa's positions regarding the need to protect joint venture innovation, the importance of protecting private property, and the economic and competitive consequences of keeping the owner of the Discover Card out of the Visa system.

Id. at 71a. Similarly,

> the court acknowledge[d] that its view of the evidence differs from the jury's findings .... In fact, the court would have concluded that the harm to competition from letting Sears into the Visa system is greater than any harm from keeping Sears out.
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> ....
>
> ... [T]he court believes that Bylaw 2.06 fosters intersystem competition in the relevant market ... [and that] [s]uch competition is important ... with only five active intersystem competitors .... Simply adding another high-priced card issuer, as Sears has always been ... may provide short-term intrasystem competitive benefits within the Visa system, but in the long run ... the damages from such inclusion will outstrip the benefits.

Id. at 69a-70a.

Despite these views, the court held that VISA's policy arguments were beyond its power to implement and that the jury's verdict was not so unreasonable that it should be set aside as a matter of law. App. 70a. The court, as finder of fact on VISA's Section 7 claim, similarly favored VISA but held that the asserted harm to competition resulting from Dean Witter's proposed partial acquisition was not great enough to justify an injunction. App. 96a.

The Court of Appeals Opinion

The Tenth Circuit reversed the district court's Sherman Act decision on the ground that the record failed to demonstrate (a) that VISA possessed market power in the issuance of general purpose charge cards, (b) that there was any harm to competition in that market, or (c) that Dean Witter had proven the kind of "extraordinary" facts that would trigger a compelled duty for VISA to share its property with its competitors. App. 19a, 25a.

Given those conclusions, Dean Witter's claim reduced simply to a concern for advancement of its own strategic objectives. And, as the court observed, "a producer's loss is no concern of the

antitrust laws, which protect consumers from suppliers rather than suppliers from each other." App. 25a (citing *Stamatakis Indus. v. King*, 965 F.2d 469, 471 (7th Cir. 1992)).[13]

REASONS WHY THE WRIT SHOULD BE DENIED

I.

THERE IS NEITHER CONFLICT NOR ERROR IN THE TENTH CIRCUIT'S ANALYSIS OF VISA'S MEMBERSHIP RULES.

Petitioner initially seeks *certiorari* on the ground that the Tenth Circuit's decision is in "conflict[ ] with other circuits" because it "validat[es] as ancillary a joint venture's counter-efficient and hence naked restraint of trade." Pet. 13. That assertion is wrong.

A. There Is No Conflict.

Dean Witter's claimed conflict in the circuits on the issue of ancillary restraints is transparently contrived. The fundamental tension in the law which Dean Witter says necessitates urgent resolution by this Court went utterly unnoticed by the Tenth Circuit. That is not surprising since Dean Witter invited no debate over the issue in that court. In fact, virtually none of the cases relied on by Dean Witter in its petition were even cited, let alone discussed, in its brief in the court below. Of the eight court of appeals cases cited in the "ancillary restraint" section of the petition, five were not mentioned at all.[14] Of the remaining three,

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[13] Having rejected plaintiff's Sherman Act claim as a matter of law, the court had no reason to consider the trial court's disposition of VISA's Clayton Act counterclaim. App. 26a.

[14] *In re Detroit Auto Dealers Ass'n, Inc.*, 955 F.2d 457 (6th Cir.), *cert. denied*, 113 S. Ct. 461 (1992); *Polk Bros., Inc. v. Forest City Enters.*, 776 F.2d 185 (7th Cir. 1985); *Los Angeles Memorial Coliseum Comm'n v. NFL*, 726 F.2d 1381 (9th Cir.), *cert denied*, 469 U.S. 990 (1984); *Edwin K. Williams & Co., Inc. v. Edwin K. Williams & Co. — East*, 542 F.2d 1053 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2973 (1977); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 521 F.2d 1230 (3d Cir.

Rothery[15] and *Premier Electrical*[16] were cited in passing and for entirely unrelated propositions. The final case, *NASL*,[17] was discussed substantively, but its only claimed relevance in the pending petition concerns the question of "less restrictive alternatives" — a matter not materially addressed in the Tenth Circuit. Equally telling, with the exception of an unrelated citation of *Rothery*, none of the cases relied on here was cited in Dean Witter's request to the Tenth Circuit for *en banc* review.

Moreover, none of the opinions cited by Dean Witter perceived a conflict in the law, and for good reason. Like many doctrines that establish a generalized framework for analysis, the concept of ancillary restraints is expressed in different words by different courts within, as well as among, the various circuits. In fact, the Tenth Circuit's decision quoted two different formulations of the rule. App. 21a. Such nuances of expression do not create a conflict. *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923) (conflict must be "real and embarrassing"); *see also Powell v. Nevada*, 114 S. Ct. 1280, 1285 (1994) (Thomas, J., dissenting); *Wilkerson v. McCarthy*, 336 U.S. 53, 66-67 (1949) (Frankfurter, J., concurring).

Dean Witter's further assertion that the Tenth Circuit failed to understand the law as explained in *Rothery* (and applied in *Premier Electrical*) is equally misguided. Contrary to the petition, it is hardly a "naked" restraint of trade for venturers to decide

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1975). One additional case, *Sullivan v. NFL*, 34 F.3d 1091 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 1252 (1995), cited on the "less restrictive alternative" issue, was decided after briefing in the main appeal but before Dean Witter's Tenth Circuit petition for *en banc* review. It was not cited in that petition, but was mentioned in a footnote in one of the *amicus* briefs filed on Dean Witter's behalf.

[15] *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987).

[16] *Premier Elec. Constr. Co. v. National Elec. Contractors Ass'n*, 814 F.2d 358 (7th Cir. 1987).

[17] *North Am. Soccer League v. NFL*, 670 F.2d 1249 (2d Cir.), *cert. denied*, 459 U.S. 1074 (1982).

that they alone will be partners, or that they are going to keep the fruits of their success for themselves.

B. Efficient Joint Venture Membership Rules.

1. The "ancillary restraint" doctrine comes from Justice Taft's opinion in *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899). It captures the important — though hardly obscure — notion that in order to get the benefits of integration parties may need to limit competition among themselves in certain respects. Such agreements are lawful when part of an integration even if they would be illegal if made apart from it.

Agreements among joint venture participants to limit territories or establish prices are examples of "ancillary" agreements which may limit competition that otherwise would exist *between venture members*. To determine whether such agreements are lawful courts ask whether the limitation removes more competition between the venturers than is reasonably necessary for the legitimate goals of their venture. By contrast, there is no elimination of competition between venturers to be tested for ancillarity when members merely decide not to share the venture's property with outsiders. Accordingly, cases considering compulsory admission to joint ventures typically do not focus on the ancillary restraint doctrine at all.[18] But whether phrased in terms of ancillary restraint principles or not, the relevant issue is whether a firm or group of firms is obliged to share the fruits of their investment in risk-taking and innovation with others. Absent such a duty, no antitrust issue is presented.

2. Not even Dean Witter denies that the VISA venture creates efficiencies. VISA joined banks together to establish a network of card-issuing and merchant-signing members. Because of so-called network efficiencies, the original venturers admitted

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[18] *See, e.g., United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) ("*St. Louis Terminal*"); *Schachar v. American Acad. of Ophthalmology, Inc.*, 870 F.2d 397 (7th Cir. 1989); *Phil Tolkan Datsun, Inc. v. Greater Milwaukee Datsun Dealers' Advertising Ass'n*, 672 F.2d 1280 (7th Cir. 1982).

many new members with certain qualifications. According to petitioner, this "network" efficiency is the sole justification for collaboration. It must justify every one of its rules but cannot justify the exclusion of a new member who would add to the network efficiencies. This is the essence of the petition and it is wrong in three fundamental ways: it ignores free riding, incentives to form joint ventures, and the importance of favoring competition over combination.

3. Up to a point, new members add to a network's efficiency, as the petition argues. Yet different applicants for admission bring different benefits and costs to VISA as well as the economy. Excluding Dean Witter and American Express from VISA avoids the free riding that would result, for example, were they to use VISA's goodwill as part of joint solicitation or promotional campaigns (to cardholders and/or merchants) or when they obtain access to and influence over product development and marketing plans.[19] That VISA chose not to allow its major interbrand competitors to use the VISA brand is fully consistent with welcoming other new members.[20]

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[19]Dean Witter vigorously protests that "free riding" forms no part of its intentions. But VISA's value to it is only the free ride. Since Dean Witter independently established all of the systems and other infrastructure necessary to operate its own national credit card network, the only things it could get from VISA are the goodwill attached to the VISA brand and access to the VISA merchant base — neither of which it did anything to create. That is free riding and nothing but.

Nor does the possibility of "payment" solve the problem. Determining the appropriate charge for a system-level competitor would be extremely difficult, if not impossible. Indeed, as a practical matter that process is likely simply to lead to further litigation. More important, payment does not address either the issue of initial incentives or intersystem competition, discussed in text.

[20]At trial, Dean Witter made much of VISA's admitting others while "discriminatorily" excluding it. It further suggested that it could not demand admission had VISA been a closed venture in the first place. The petition's arguments, however, would require a "network"-type venture to admit all applicants, even if monopoly results. Indeed, a compulsory admission rule for open ventures would induce venturers to

VISA is an "open" venture — not unlike manufacturers or franchisors who expand the number of outlets but "close" their system to some new participants. Thus, it would not be unusual for McDonald's (1) to stop franchising in a certain area after enough penetration had been achieved or (2) to decline to allow Wendy's to own and operate McDonald's outlets even in an area where it was still "open," and even though Wendy's says "I can make tastier 'Big Macs' or sell them cheaper." It is neither counter-intuitive, nor uncommon, for a business not to want to help its competitors. *See, e.g., Olympia Equip. Leasing Co. v. Western Union Tel. Co.*, 797 F.2d 370, 379 (7th Cir. 1986), *cert. denied*, 480 U.S. 934 (1987).

4. Efficiency, properly understood, embraces not merely the narrow *ex post* effects of a particular decision to share one's property, but also the *ex ante* "macro" efficiencies that depend upon general assumptions about the way the economy works. As Prof. Areeda noted several years ago, the efficiency justification for refusing to imply a duty to share one's creations with others rests fundamentally upon broad policy considerations:

> These legitimate business purposes are not personal to any particular defendant, but are propositions of general policy. For example, the justification for refusing to share a research laboratory does not focus on the practical infeasibility of letting another use the laboratory, but on the general concern that the defendant never would have built a laboratory of that size and character in the first place if he had known that he would be required to share it. Required sharing discourages building facilities such as this, even though they benefit consumers.

Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 851 (1990).

There is no question that the foregoing principles apply to the property of single firms. Indeed, no one would take a demand for compelled sharing of a single firm's property seriously. *See, e.g.,*

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create only closed ventures even when additional members would be efficient for the venture and procompetitive for the economy.

Olympia, 797 F.2d at 375-76. There is no reason to apply a different rule generally to joint ventures. *St. Louis Terminal* said as much in 1912.[21] In fact, both Dean Witter's trial expert and its academic consultants not only acknowledge the need to protect property rights and incentives for innovation, but concede that such considerations generally apply to the property of joint ventures as well as single firms. *See* R. at 829-33. It could not be otherwise since a different rule would discourage the formation of joint ventures by making their property and innovations less secure against forced sharing and, hence, less valuable.

These are scarcely novel observations. In fact, prior to the cottage-industry of post-trial writings by Dean Witter's consultants,[22] the efficiency-enhancing attributes of joint venture mem-

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[21] *St. Louis Terminal* is often referred to as the source of the essential facilities doctrine under the Sherman Act. It involved a group of railroads that had acquired a monopoly over the means of crossing the Mississippi River. The Court remedied the monopolistic combination by requiring admission of the excluded railroads, but only after very carefully limiting its scope. Invoking *Standard Oil's* observation that a "fundamental purpose[ ] of the [Sherman Act] is to protect, not to destroy, rights of property," 224 U.S. at 409, the Court held that "in ordinary circumstances," a group of independent companies might combine to control facilities for their "exclusive use." Others could thereafter "be admitted" on any terms set by the owners or could be "excluded altogether." 224 U.S. at 405, 409. It was only where "inherent conditions" (or some other insuperable obstacle) made fair competition impossible (and, therefore, made access "essential") that a duty to deal might be imposed. *See, e.g.*, Baker, *Compulsory Access to Network Joint Ventures Under the Sherman Act: Rules or Roulette?*, 1993 Utah L. Rev. 999, 1088-89 & n.339. (Research for the Baker article was funded by several VISA members.)

[22] *See* Carlton & Frankel, *The Antitrust Economics of Credit Card Networks*, 63 Antitrust L.J. 643 (1995); Carlton & Salop, *You Keep on Knocking But You Can't Come In: Evaluating Restrictions on Access to Input Joint Ventures*, Working Paper No. 111, Center for the Study of the Economy and the State, The University of Chicago (April 1995); Hovenkamp, *Exclusive Joint Ventures and Antitrust Policy*, 1995 Colum. Bus. L. Rev. 1 (forthcoming Summer 1995). Every one of these authors is a retained consultant in this case for Dean Witter, although

bership limitations was nearly universally recognized. For example, Prof. Robert Pitofsky, now Chairman of the Federal Trade Commission, has noted:

> Why should joint venturers, particularly those who took significant risks in order to establish the project, offer the advantages of membership to rivals? Incentives for risk-taking and innovative efforts will certainly diminish if advantages of the undertaking must be made available to non-participants. The [compulsory access] rule becomes even more questionable where the rival applicants passed up an opportunity to participate in the joint venture in the first place.

Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 54 Antitrust L.J. 893, 902-03 (1985).

Similar observations were made by Joseph Kattan, former head of the Policy Section of the FTC's Bureau of Competition:

> From an efficiency standpoint, mandatory access rules are troubling. Limitations on joint venture membership offer a great procompetitive potential .... [A] requirement of mandatory access after a venture has succeeded in attaining its goals [also] can inhibit collaborative efforts to innovate in the first place. If free and open access is required, potential venturers may decide to avoid entering a joint venture, and incurring the risk that membership in the venture entails, because they may be required to share the fruits of the joint venture with outsiders if the venture succeeds but will be required to bear the losses alone if the venture fails. This free rider effect creates a serious risk that some efficiency-enhancing projects would be delayed or altogether deterred.

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none was ever called as a witness or made available for cross-examination. Given these relationships, Dean Witter should hesitate to point to these consultants as "commentators" who have "already specifically criticized the mischievous implications of the Tenth Circuit's market power analysis in this case." Pet. 29.

Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 Antitrust L.J. 937, 963 (1993).[23]

5. Far from condemning membership limitations, the primary antitrust concern is that a joint venture might become "*over*inclusive" by admitting those who can compete effectively with the venture. *See* Department of Justice, *Antitrust Enforcement Guidelines for International Operations, reprinted in* 4 Trade Reg. Rep. (CCH) ¶ 13,109 (1988).[24] Yet, Dean Witter insists here that antitrust law requires the partial integration of Dean Witter

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[23] *See also EFT, supra*, ¶ 21.05[2], at 21-36 (duty of joint ventures to "grant compulsory access to their competitors whenever they achieve a really significant success . . . blunt[s] their incentive to invest and innovate"); Balto, *Access Demands, supra*, at 667 ("Where the excluded party is able to compete effectively with the joint venture, its mandatory admission into the venture is likely to diminish competition in the market in which the venture competes."); Blumenthal, *Three Vexing Issues Under the Essential Facilities Doctrine: ATM Networks as an Illustration*, 58 Antitrust L.J. 855, 868 (1990).

[24] The joint venture discussion in the 1988 Guidelines (quoted at length by the Tenth Circuit, App. 25a n.20) was not included in the 1995 revisions of those guidelines because the earlier version did not address any issue uniquely germane to international commerce. However, there is no reason to believe that the Department's view of the subject of joint venture membership rules has changed. Dean Witter pretends otherwise, suggesting that the Department's 1994 Health Care Guidelines are somehow at odds with the Tenth Circuit's opinion (Pet. 17-18, 28). However, Dean Witter inexplicably ignores the portion of the guidelines most directly pertinent to the issues here. *See* Dep't of Justice & FTC, *Statements of Enforcement Policy and Analytical Principles Relating to Health Care and Antitrust*, 67 Antitrust & Trade Reg. Rep. (BNA) (Supp. Sept. 29, 1994), at S-24 (exclusion from multiprovider networks raises competitive concerns only if "providers are *unable to compete effectively* without access to the network, and competition is thereby harmed. . . . In addition, in certain circumstances network membership restrictions may be procompetitive by giving nonmember providers the incentive to form other networks in order to compete more effectively with the network.") (emphasis added); *see also* Balto, *Access Demands, supra*, at 673.

with VISA — thereby *increasing* its market power in the sense Dean Witter uses that term (*see infra* p. 23), potentially to monopoly[25] — even though such integration is not essential to its effective competition.

Dean Witter argued at trial that these concerns were beside the point because it did not intend to abandon Discover if it became a VISA member. But VISA did not suggest otherwise and nothing turns on that point. Rather, VISA's point is that both VISA's and Dean Witter's competitive incentives inevitably would be affected by Dean Witter becoming both a proprietary system owner and a major card association member. Dean Witter in particular would have strong incentives to coordinate its brand strategies as well as to attempt to blunt VISA's competition against Discover. *See* 5 P. Areeda, *Antitrust Law* ¶ 1203c, at 319-20 (discussing potential effects of partial integration on competitive incentives, including possible misuse of confidential information or the creation of "tacit understandings"). Moreover, the relative amount of resources (financial and human) devoted to Dean Witter's two brands could well be affected, particularly over time. *See* Balto, *Antitrust and Credit Card Joint Ventures*, 47 Consumer Fin. L.Q. Rep. 266, 271 n.38 (1993).

Nor are these concerns merely theory. At trial, VISA introduced a memorandum from a high-ranking Discover official who urged Dean Witter to apply for membership in VISA in 1988 (even though Dean Witter then had no plans to issue a VISA card) because Discover would be "in a position to know everything that takes place at VISA." R. at 1346. Equally candidly, Dean Witter's CEO testified that he wanted to join VISA because VISA and its members were competing too aggressively against his new Discover brand and he hoped to "limit" that competition by being on the inside. R. at 387-89.

Dean Witter's argument substantially undervalues the importance of preserving competition at the system (or brand) level.

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[25] American Express filed an *amicus curiae* brief in support of Dean Witter below and has stated its intention to follow Dean Witter in issuing a VISA and/or MasterCard. *See* Einhorn, *One Word: Plastic*, Barrons, Sept. 19, 1994, at 29, 33.

But many important types of competition in the charge card business take place at the systems level. The district court, as trier of fact, found that preservation of such competition yielded important benefits for consumers and that, on balance, the benefits of such preservation exceeded any intrasystem benefits which might result from Dean Witter's forced admission — although not by a sufficient margin to support an injunction under Section 7 of the Clayton Act. *See* App. 70a-71a, 96a-97a.

Dean Witter professes shock that VISA failed to welcome the reduction of competition that would have resulted from its partial integration with Dean Witter. In fact, of course, a firm may prefer to resist combinations potentially resulting in monopoly because of possible regulation by federal or state antitrust suits. More important than petitioner's doubt about VISA's state of mind, however, are the facts about competition. Admitting Dean Witter and American Express would significantly threaten intersystem competition (where the market is already highly concentrated), without any offsetting showing that adding yet another issuer to the thousands that already exist would have a material impact on issuer competition. The Tenth Circuit readily perceived the perversity of that outcome. Invoking contrived arguments about ancillary restraints based upon an insupportably narrow view of economic efficiency states no case for review by this Court.

II.

THERE IS NO CONFLICT AMONG THE CIRCUITS AS TO MARKET POWER; NOR DID THE DECISION BELOW TURN ON MARKET POWER ALONE.

Market power is important in rule of reason cases because it has the potential to save courts and litigants from the burden, expense and possible error of evaluating a practice which has no potential to harm competition in any event. *See, e.g., Schachar v. American Acad. of Ophthalmology, Inc.*, 870 F.2d 397, 398 (7th Cir. 1989); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986). It is a structural way of getting to the question that antitrust law is directly concerned with: whether a particular practice is likely to raise prices or

restrict output in some relevant area of commerce. As this Court noted in *FTC v. Indiana Federation of Dentists,* market power is simply a surrogate for evaluating actual effects. 476 U.S. 447, 461 (1986); *cf.* Hay, *Market Power in Antitrust,* 60 Antitrust L.J. 807, 825 (1992).

Dean Witter alternatively seeks *certiorari* because of an alleged conflict among the circuits about "the role and definition of market power" in joint venture cases. Pet. 22-30. Review is no more appropriate on this ground. First, Dean Witter's entire argument depends on the false premise that, in deciding this case, the Tenth Circuit adopted a market power "screen" that was outcome determinative. Second, as with ancillary restraints, there is no meaningful conflict in any event.

1. The principal market power issue addressed by the court below was not the existence of a market power "screen" but Dean Witter's "collective share" thesis. Dean Witter argues that VISA's market power should be measured by comparing all VISA volume with total volume in the stipulated market for general purpose charge cards (adding in MasterCard volume to boot). The Tenth Circuit rejected Dean Witter's market power analysis as fatally flawed because it had nothing to do with the underlying "effects" question the court was attempting to answer: to wit, whether excluding Dean Witter and American Express from a 6,000 member venture (with an issuer-level HHI below 500),[26] and with no restriction on pricing, geographic distribution or output by any of the system's members gives VISA's members (or anyone else, for that matter) the power to raise price or restrict output.

To measure market power the Tenth Circuit correctly asked, in effect, "power to do what?" The answer depends on the threat to competition that Dean Witter alleged — namely, preventing Dean Witter from issuing a VISA card. Because members do not

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[26] "HHI" refers to the Herfindahl-Hirschman Index, a statistical method for measuring market concentration. An industry with an HHI of less than 1,000 is considered unconcentrated for market structure purposes. *See* Pitofsky, *New Definitions of Relevant Market and the Assault on Antitrust,* 90 Colum. L. Rev. 1805, 1821 (1990).

collectively determine the prices or output of VISA's many issuers, one must measure power, not by reference to collective market shares, but by the structure of competition among card issuers and the effect of the brand exclusion upon such competition. Not only are there some 6,000 issuers of VISA cards alone, but nothing prevents Dean Witter from charging low subscription fees or interest rates on any existing or new version of its Discover card including, if it chose, one with all of the features of its proposed Prime Option card (except the VISA name). The Tenth Circuit correctly saw a highly competitive market for the issuance of general purpose charge cards that would not be noticeably more competitive whether or not Dean Witter issued a VISA card.

This point was explained at trial by VISA's expert, Richard Schmalensee. It is explained again, in only slightly more conceptual terms, in a recent article which he co-authored with Prof. David Evans, *Economic Aspects of Payment Card Systems and Antitrust Policy Toward Joint Ventures*, 63 Antitrust L.J. (forthcoming 1995). As they note:

> When established sellers get together to prevent another firm from entering the market, they prevent price (and other) competition between the potential entrant and all existing firms. Assuming that the existing firms are competitive in all other respects, the effect of the exclusion does not depend on the market share of the firms that acted to prevent entry but on the amount of competition excluded. Even if all existing sellers with 100 percent of the market prevent entry, prices would not increase (or output decrease) if they only barred a small potential competitor . . . . What we need to know . . . [therefore] is what the market would look like with and without the exclusion. That is the only inquiry that helps us get to the question that market power analysis is designed to answer. Market effects therefore depend on the magnitude of the output excluded from the market, and aggregating the market shares of the "excluders" does not address that issue.

What is more, the Tenth Circuit did not even rest its reversal upon its conclusions about market power. What is called an analysis of market power is equally well described as an analysis

of effects (or, rather, the absence thereof). Indeed the court made that point explicitly. Assuming *arguendo* that Dean Witter somehow demonstrated market power through its "collective share" thesis,[27] the court held that petitioner's case still failed because of its inability to prove any adverse *effect* upon competition. *See supra* p. 12. Indeed, the opinion specifically takes Dean Witter to task for its failure to focus meaningfully on effects:

> [I]t is not the rule-making *per se* that should be the focus of the market power analysis, but the *effect* of those rules — whether they increase price, decrease output, or otherwise capitalize on barriers to entry that potential rivals cannot overcome. Although [Dean Witter's expert] testified "*if* they can keep prices up or from falling they can make a lot of money" to support his conclusion that Visa USA possesses market power, there was no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity had occurred.
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> Thus, without any eye on effect, the very exercise of rule-making became the factual basis for rule of reason condemnation of Bylaw 2.06. Consequently, rule-making was not only divorced from its functional analysis but also from the facts of the case.

App. 19a (emphasis added).

Nor was market structure the only obstacle over which Dean Witter stumbled irretrievably. Confronted with a competitive and diffuse market, petitioner was unable to adduce any evidence of supracompetitive profits or any other indicia concerning price or output suggesting that the competitive structure of the issuing market somehow failed to reflect actual market conditions.[28] *See* App. 25a.

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[27] *See* App. 18a: "*even if* Visa USA possesses market power . . ." (emphasis added).

[28] Petitioner did attempt to color its jury case with assertions about VISA banks' "high profits," but such assertions cannot be equated with "supracompetitive" profits absent "evidence, such as studies on the comparative costs of production or on market conditions, to indicate that

In short, Dean Witter's case failed without regard to any particular standard of market power. It failed because of petitioner's simple — if wholly predictable — failure to prove harm to competition. However much petitioner may attempt to stand the concept of harm to "competition, not competitors" on its head (*see* Pet. 13, 27) its failure to prove anything more than a loss to itself obviates the asserted need to review any other issue.

2. Petitioner's strained effort to assert an inter-circuit conflict on the role of market power in applying the rule of reason founders on the same rock as its other purported conflict — a misguided assumption that courts can or should adopt a single set of words to describe an approach to market power. *Cf. Miroyan v. United States,* 439 U.S. 1338, 1339 (1978) (Rehnquist, Circuit Justice) ("difference of approach" is different from "square conflict"); *see also* Cole, *Petitioning for Certiorari in the Big Case,* Litigation, Spring 1986, at 33, 34 ("A true conflict is what Professor Felix Frankfurter called a 'head-on collision' between two courts."). All courts applying the rule of reason recognize the great importance of market power or actual effects. Some courts speak of substantial power as a preliminary hurdle (filter or screen) that must be jumped before proceeding further — especially when a plaintiff has failed to prove a relevant market at all, the defendant's market share seems truly trivial, or the relevant market is vigorously competitive in structure or results. That a failure to prove market power can doom a rule of reason claim hardly requires examination or explication by this Court.

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these profits were above those available in a competitive market." *Reserve Supply Corp. v. Owens-Corning Fiberglass Corp.,* 971 F.2d 37, 52 (7th Cir. 1992); *see also Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.,* 113 S. Ct. 2578, 2595 (1993); Hay, *Market Power, supra,* at 825 ("[p]rofits can be the result of luck, skill, or simply the short-run disequilibrium of an industry"). Moreover, no inference of supracompetitive pricing could have been drawn here when much of the competition in the charge card industry is "nonprice" competition, such as high credit limits, more lenient credit approval standards, or purchase "add-ons" such as frequent flier miles or credit towards the purchase of other products. *See Brooke Group,* 113 S. Ct. at 2594.

Nor is there any inconsistency among the circuits when the courts buttress their doubts about market power with observations about the legitimacy of a defendant's conduct. Indeed, far from conflicting with other circuits, the Tenth Circuit here variously described the role of market power as a "filter," "screen," or "presumption," while also favoring a "two-step process" that considers an alleged restraint's redeeming virtues.[29]

3. Dean Witter's further claim that the Tenth Circuit required it to prove that it was excluded "*entirely* from the market" is false. Rather, the Tenth Circuit emphasized the lack of evidence that excluding Dean Witter from VISA disabled it from *effective* competition in the stipulated market. (App. 25a-26a.)

III.

THIS CASE IS INAPPROPRIATE FOR REVIEW IN ANY EVENT.

The stated premise underlying Dean Witter's petition is that joint ventures present increasingly important antitrust issues that this Court has not fully addressed. But whatever "great" joint venture issues might exist in theory do not arise *on the record in this case* or the Tenth Circuit's routine disposition of it.

1. The court of appeals simply ruled that there was no proof of sufficient power or effect. While petitioner may quarrel with that

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[29]Thus, for example, the petition asserts a conflict between the decision below and the Second Circuit's decision in *Capital Imaging Assocs. v. Mohawk Valley Medical Assocs.*, 996 F.2d 537 (2d Cir. 1992), *cert. denied*, 114 S. Ct. 388 (1993). In fact, the Second Circuit affirmed judgment for the defendant as a matter of law on account of plaintiff's failure to meet its "initial burden of showing that the challenged action has had an *actual* adverse effect on competition as a whole in the relevant market . . . ." 996 F.2d at 543 (emphasis in original). In addition, the Second Circuit goes at least as far as the Tenth in noting that market power is a "highly relevant factor" and in quoting with favor Prof. Areeda's observation that "[w]hen market power is lacking, antitrust litigation is not needed to police restraints and maintain competition . . ." 996 F.2d at 546 (quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, at 429).

determination, it does not seek review on that ground but on invented conflicts. *Cf. NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502-03 (1951).

2. The petition is inconsistent with the theory on which Dean Witter tried the case below. The petition's arguments make no distinction between open and selectively closed joint ventures, while Dean Witter argued at trial and in the Tenth Circuit that its position depended heavily on VISA's having adopted only recently a rule closing it to firms like Dean Witter and American Express. *See* App. 23a. Issues involving such a generally-open-then-selectively-closed venture are hardly so widespread as to need this Court's resolution.

3. The alleged anticompetitive effect that Dean Witter asserted before the Tenth Circuit and in its petition is its exclusion from issuing VISA or MasterCard "bank cards," although the relevant market to which Dean Witter *stipulated* was the general purpose charge card.[30]

4. Accepting the petition's invitation to pronounce abstractly on ancillarity is inappropriate when the "efficiency" concept is so much broader than the petition asserts and when there was no proof of market power, supracompetitive pricing or anticompetitive effects.

5. Petitioner's claim that VISA's by-law was anticompetitive on the separate ground that it would discourage present or future VISA members from developing proprietary cards is not

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[30]The implicit suggestion that there is some narrower market, limited to the bank association cards, is far-fetched in any event. Consumers, in fact, carry many credit cards. They do so for many different reasons, ranging from a desire for multiple credit lines, to different features, to a need to maintain separate personal and business accounting, to mention but a few. However, the fact that one consumer carries a Citibank VISA card and a Chemical Bank MasterCard, another carries a Bank of America VISA, an American Express True Grace and a NationsBank VISA, and still another carries a Chase Manhattan VISA card and a Dean Witter Discover card scarcely suggests that Discover has been excluded from anything — let alone that there is a separate market limited to "bank cards."

presented by this case. The claim involved no proof but only "the widest array of speculation." App. 19a n.14. Moreover, Dean Witter already had developed a successful proprietary card and could not itself have been harmed but only benefitted by any "disincentive" for the creation of other new proprietary cards. Thus it lacked standing to seek either damages or an injunction on that basis. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 337-38, 342 (1990); *see also Cargill Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104 (1986) (same re injunction). Nonetheless, this speculative claim was submitted to the jury under instructions and a verdict form that make it impossible to determine what weight the jury gave to any particular evidence or theory. Petitioner cannot now ignore that problem, either in describing what the jury "surely perceived" (Pet. 21) or "specifically found" (*id.* at 27), or in attempting to isolate controlling legal issues for review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of *Certiorari* should be denied.

Respectfully submitted,

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